Malaysia Building Society Bhd v KCSB Konsortium Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-13–02 OF 2015(J)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, HASAN LAH, RAMLY ALI AND BALIA YUSOF FCJJ
14 FEBRUARY 2017

Land Law — Charge — Indefeasibility of interest — Respondent intended to enter third party charge on its land in favour of appellant — First party charge mistakenly filed in Form 16A — Respondent applied to set aside charge — Whether Form 16A insufficient instrument — Whether error could be corrected pursuant to s 380(1) of the National Land Code ('the NLC') — Whether court could order registrar to give effect to decision of court pursuant to s 417 of the NLC — National Land Code ss 340(2)(b), 380(1) & 417

A loan agreement ('the loan agreement') was entered into by the appellant and a company known as Definite Pure Sdn Bhd for the purpose of financing a building project. The respondent was to provide security for the said loan, as such the respondent agreed to create a third party charge over its lands in favour of the appellant. Problem arose when the charge instruments in Form 16A were mistakenly registered as a first party charge instead of a third party charge. Consequently, the respondent filed an originating summons to set aside the charge entered on the said land. The High Court found that the mistake in the Form 16A was not an error or omission capable of correction by the registrar pursuant to s 380(1)(a)–(c) of the National Land Code ('the NLC'), as such, the High Court allowed the respondent's application. On appeal by the appellant, the Court of Appeal agreed with the finding of the High Court and dismissed the appeal. Aggrieved by the decision, the appellant filed the present appeal. The issues for court's consideration were: (a) whether the conflict between Form 16A filed and the loan agreement and the charge annexure rendered the form to be an 'insufficient instrument' within the meaning of the words in s 340(2)(b) of the NLC; and (b) whether the error could be corrected pursuant to s 380(1) of the NLC. Further, the appellant relied on s 417 of the NLC for the court to give the necessary direction to the registrar to give effect to the decision of the court.

Held, allowing the appeal with costs and setting aside the order of the High Court as affirmed by the Court of Appeal:

(1) In considering whether the form filed suffered from any insufficiency or otherwise, the court need to look at the form alone and not elsewhere ie the loan agreement and the charge annexure. In the circumstances,

paras (b) and (c) of the charge instrument were deleted hence making it into a first party charge instead of a third party charge as intended by the parties. Apart from that error the instrument did not suffer from any deficiency. Form 16A was sealed with the seal of the respondent's company and attested to by directors of the company or a director together with the secretary of the company. Thus, it was not an 'insufficient instrument' as envisaged by s 340(2)(b) of the NLC which rendered the charge created pursuant thereto defeasible (see paras 23–24).

(2) There was no doubt that there was substantial compliance with the prescribed form notwithstanding the error. Further, it had never been suggested that anyone, be it the respondent or any other party, was ever prejudiced by the error. Thus, the error in Form 16A filed in the present case may be rectified by the registrar pursuant to s 380(1)(b) of the NLC to achieve what was intended by the parties (see para 29).

(3) It is clear that under s 417 of the NLC, the court is vested with the power to direct the registrar to do anything it deems necessary to give effect to its judgment or order. This broad power is conferred by the NLC on the court to ensure that judgment or order of the court is duly carried out by the registrar. As such, pursuant to s 417 of the NLC, the court directed the registrar to review the file relating to the said charge and cause the rectification of the charge as a third party charge. In totality, the impugned charge was a valid charge (see paras 33–34).

[Bahasa Malaysia summary

Perjanjian pinjaman ('perjanjian pinjaman tersebut') dimasuki oleh perayu dan syarikat yang dikenali sebagai Definite Pure Sdn Bhd bagi tujuan pembiayaan projek bangunan. Responden adalah untuk memberikan sekuriti bagi pinjaman tersebut, dengan itu responden bersetuju untuk membentuk caj pihak ketiga ke atas tanahnya berpihak kepada perayu. Masalah berbangkit apabila instrumen caj dalam Borang 16A secara salah didaftarkan sebagai caj pihak pertama sepatutnya caj pihak ketiga. Akibatnya, responden memfailkan saman pemula untuk mengetepikan caj yang dimasuki ke atas tanah tersebut. Mahkamah Tinggi mendapati bahawa kesilapan dalam Borang 16A bukan kesilapan atau ketinggalan yang membolehkan pembetulan oleh pendaftar berikutan kepada s 380(1)(a)–(c) Kanun Tanah Negara ('KTN'), dengan itu, Mahkamah Tinggi membenarkan permohonan responden. Atas rayuan oleh perayu, Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi dan menolak rayuan tersebut. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu untuk penentuan mahkamah adalah: (a) sama ada konflik di antara Borang 16A yang difailkan dan perjanjian pinjaman dan lampiran caj menjadikan borang tersebut sebagai 'insufficient instrument' dalam maksud perkataan-perkataan di dalam s 340(2)(b) KTN; dan (b) sama ada kesilapan boleh diperbetulkan berikutan s 380(1) KTN. Selanjutnya,

perayu bergantung ke atas s 417 KTN untuk mahkamah memberikan arahan perlu kepada pendaftar untuk memberi kesan kepada keputusan mahkamah.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah Mahkamah Tinggi seperti yang disahkan oleh Mahkamah Rayuan:

(1) Dalam mempertimbangkan sama ada borang yang difailkan mengalami apa-apa ketidakcukupan atau sebaliknya, mahkamah perlu melihat kepada boring itu sendiri dan bukan di tempat lain iaitu perjanjian pinjaman dan lampiran caj. Dalam keadaan, perenggan (b) dan (c) instrumen caj tersebut dipadamkan maka membuatkannya kepada caj pihak pertama dan bukan caj pihak ketiga seperti yang diniatkan oleh pihak-pihak. Selain daripada kesilapan tersebut instrumen tidak mengalami apa-apa kekurangan. Borang 16A dimeterai dengan meterai syarikat responden dan disahkan oleh pengarah-pengarah syarikat atau pengarah bersama dengan setiausaha syarikat. Oleh itu, ia bukan 'insufficient instrument' seperti yang dibayangkan oleh s 340(2)(b) KTN yang menyebabkan caj yang terbentuk boleh dibatalkan (lihat perenggan 23–24).

(2) Tidak terdapat keraguan bahawa terdapat pematuhan yang substansial dengan borang yang dinyatakan meskipun kesilapan tersebut. Selanjutnya, ia tidak pernah dicadangkan oleh sesiapa pun, responden atau pihak yang lain, diprejudiskan dengan kesilapan tersebut. Oleh itu, kesilapan dalam Borang 6A difailkan dalam kes ini boleh diperbetulkan oleh pendaftar berikutan kepada s 380(1)(b) KTN untuk mencapai apa yang diniatkan oleh pihak-pihak (lihat perenggan 29).

(3) Adalah jelas bahawa di bawah s 417 KTN, mahkamah diletakhakkan dengan kuasa untuk mengarah pendaftar untuk berbuat apa-apa yang ia anggap perlu untuk memberi kesan kepada penghakiman atau perintahnya. Kuasa luas ini diberikan oleh KTN kepada mahkamah untuk memastikan bahawa penghakiman atau perintah mahkamah dilaksankan dengan wajar oleh pendaftar. Dengan itu, berikutan s 417 KTN, mahkamah mengarahkan pendaftar untuk menyemak semula fail berkaitan caj tersebut dan menyebabkan pembetulan caj tersebut sebagai caj pihak ketiga. Secara keseluruhannya, caj yang dipersoalkan tersebut adalah caj yang sah (lihat perengga 33–34).]

Notes

For cases on indefeasibility of interest, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2871–2875.

Cases referred to

Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd [1997] 3 MLJ 373, CA (refd)

Hassan bin Seman & Ors v Jusoh bin Awang Chik [1982] 1 MLJ 66, FC (refd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)
Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 (refd)
Mook Meng Sun v Lo Aa Kau & Ors [2002] 2 MLJ 193, HC (folld)
Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226, FC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181, FC (refd)
Tan Soo Bing & Ors v Tan Kooi Fook [1996] 3 MLJ 547, FC (refd)
Tan Tock Kwee & Anor v Tey Siew Cha & Anor [1995] MLJU 408; [1995] 4 CLJ 658, HC (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)
Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd [2011] 4 MLJ 681, FC (refd)
Woon Kim Poh v Sa' Amah bt Hj Kasim [1987] 1 MLJ 400, SC (refd)

Legislation referred to

National Land Code 243, 336, 340, 340(1), (2), (2)(b), (3)(a), 380, 380(1), (1)(a), (1)(b), (1)(c), 417, Form 16A

Cyrus Das (K Gobinath and V Rakesh with him) (Kadir Andri & Partners) for the appellant.
Malik Imtiaz Sarwar (Gobind Singh Deo with him) (Lopez & Chin) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 16 October 2014 which dismissed the appellant's appeal with costs. Leave to appeal was granted by this court on 29 January 2015.

THE FACTS

[2] The facts pertinent to this appeal are as follows. The Government of Malaysia ('the government') entered into a privatisation agreement with the respondent dated 10 July 1997 under which the respondent undertook to build an army camp for the Ministry of Defence ('the army camp project') at Pulai in Johor Bahru.

[3] In exchange, the government agreed to transfer to the respondent the following two pieces of lands ('the lands') located in Johor Bahru:

A (a) lease No 648, Lot 1876, Mukim of Plentong measuring in area of approximately 310.75 acres; and

(b) lease No 548, Lot 139, Mukim of Tebrau measuring in area of approximately 71.406 acres.

B

[4] The lands were to be used as security to raise the fund to enable the respondent to carry out the army camp project. Meanwhile, the respondent assigned all its rights and obligations under the privatisation agreement to one Kausar Corp Sdn Bhd ('Kausar').

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[5] In 1997, Kausar entered into discussions with the appellant to finance the development of the lands. Pursuant to these discussions, it was agreed that the appellant will provide the funding for the development of the lands and that a joint venture agreement will be entered into with the respondent.

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[6] Under the joint venture, a loan agreement was entered into on 21 October 1997 between the appellant and a company known as Definite Pure Sdn Bhd ('the borrower company'). The borrower company was the intended joint venture vehicle through which the development of the lands will take place.

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[7] At the request of the borrower company and pursuant to the loan agreement dated 21 October 1997, the appellant agreed to provide the borrower company with the following facilities ('loan facilities'):

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(a) a term loan of up to RM465m ('term loan') for principal only inclusive of a land bond ('land bond'); and

(b) an advance of up to RM65.1m ('advance').

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[8] The borrower company was not in the position to provide security for the loan. As such, by the terms of the loan agreement, the respondent was to create a third party charge over the lands in favour of the appellant.

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[9] It is common ground that the parties were aware that the charge was to be a third party charge to be provided by the respondent. All relevant documents, such as, the loan agreement, the charge annexure and the joint venture agreement spoke of the creation of a third party charge.

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[10] On 2 August 1999 a charge was created by the respondent in favour of the appellant over the lands as a security for the term loan. The charge instrument in Form 16A was filed at the relevant Land Registry.

[11] Thereafter, on 29 August 2000 a second charge was created by the respondent in favour of the appellant over the lands as a security for the advance. The respondent has not applied for this second charge to be set aside.

[12] Both the charge instruments in Form 16A were, however, by mistake registered as a first party charge instead of a third party charge. This is contrary to all relevant documents ie the loan agreement and the charge annexure which provide that the respondent was to create a third party charge in favour of the appellant.

THE HIGH COURT

[13] On 12 April 2013, the respondent filed an Originating Summons ('OS') No 23M-154–04 of 2013 at the High Court of Johor Bahru to set aside the charge dated 2 August 1999 entered on the lands.

[14] In opposing the application, the appellant admitted that the charge was wrongly registered as a first party charge instead of a third party charge as a result of an error or mistake made in the instrument of charge (Form 16A). However, the appellant contended that the mistake did not nullify the charge as the mistake can be rectified under the relevant provisions of the National Land Code ('the NLC'). The appellant further contended that the charge is indefeasible under s 340 of the NLC except on the grounds as provided in s 340(2) of the NLC.

[15] It is further contended that the error or mistake in wrongly registering the charge as a first party charge instead of a third party charge as such does not affect the validity of the charge as to warrant the setting aside of the same. On the other hand, the removal of the charge will be highly prejudicial to the appellant as it will deprive the appellant the security for the loan. In any event, the appellant contended that, the error is of no consequence as the Registrar of Titles ('the registrar') has the necessary power under s 380 of the NLC to rectify the error.

[16] The High Court allowed the respondent's application to set aside the charge. The charge was held to be void and cannot be rectified by the registrar under s 380 of the NLC. In his judgment the learned judicial commissioner ('JC') held, inter alia, as follows:

> [19] The mistake in the Form 16A adverted to is serious and fundamental as, inter alia, it altered the status of the plaintiff from that of a mere third-party charger to a borrower of the substantial loan from MBSB. This altered capacity carried serious implications as to the legal liabilities and obligations of the plaintiff under the charge. The charge annexure could not rectify the situation as the Form 16A was the only instrument recognised under s 242 of the NLC. The said mistake was not a

mere error, omission or technical defect as envisaged under s 380 of the NLC that could, on application to the registrar, be corrected. In any event, the registrar and not the court was empowered to make the correction that was required. MBSB, thus, cannot in law invoke s 380 of the NLC to seek on order for rectification of the Form 16A.

[20] The above mistake renders the Form 16A an insufficient and defective instrument for registration of the charge, which would, thus, became defeasible under the provisions of s 340(2) of the NLC. It was, accordingly, voidable and liable to be declared void at the instance of the chargee.

[21] For the reasons alluded to, s 417 of the NLC did not have any application to the issues in dispute in the present case as MBSB had not obtained any judgment or order for the Registrar to give effect to.

THE COURT OF APPEAL

[17] On appeal, the Court of Appeal agreed with the finding of the learned JC that the mistake in the Form 16A was not an error or omission capable of correction by the registrar pursuant to s 380(1)(a)–(c) of the NLC. The appeal was accordingly dismissed.

THE QUESTIONS OF LAW

[18] For ease of reference, we set out below the questions of law posed to us:

Question 1

Whether indefeasibility under section 340 of the National Land Code (NLC) has relevance where the complaint is of an admitted mistake in the charge form (Borang 16A) where the charge was erroneously described and registered as a first party legal charge instead of a third party legal charge.

Question 2

Whether in the case of a mistake in an instrument of dealing under the NLC, the applicable provisions are Sections 207 and 380 of the NLC and Section 62 of the Interpretation Act 1967 to determine if the mistake is a correctable error.

Question 3

Whether the appropriate test to determine the error is of a matter of substance under the NLC and the Interpretation Act 1948 and 1967 is whether the deviation has changed the character of the instrument or calculated to mislead the parties concerned.

Question 4

Whether Section 417 of the NLC envisages a two stage procedure whereby a party has to first obtain a judgment or order in separate proceedings before the court can be moved under Section 417 to issue the appropriate directive to the Registrar or Land Administrator to give effect to the order.

OUR DECISION

[19] The questions posed to us arose directly from the decision of the High Court as affirmed by the Court of Appeal. The High Court founded its judgment on the error occurring in the charge instrument in Form 16A where paras (b) and (c) were deleted instead of para (a) as intended by the parties. As a result of the mistake in the deletion, the plaintiff chargor instead of becoming a third party chargor became a first party chargor. This is contrary to the expressed intention of the parties as provided in the loan agreement and the charge annexure.

[20] Let us first consider what is a charge under the NLC? A charge is a dealing in which the registered proprietor of land uses the property as security for the repayment of the loan advanced to him or to a third party. In the case of the former it is referred to as the first party charge while in the case of the latter it is referred to as the third party charge. In the present case, it is not in dispute that what was commonly intended by the parties was to create a third party charge in favour of the appellant for the loan facilities given to the third party (the borrower company) with the land registered in the name of the respondent as security. Under the NLC, a charge is an interest in land and it will take effect as a security transaction under the NLC upon registration (see s 243 of the NLC, *Co-Operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373). It has also been held that when a creation of a charge does not comply with the requirements of the NLC, as when the dealing is not registered, such charge is valid as an equitable charge (see *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 (FC)).

[21] In the present case, the charge was registered, but it was set aside by the court on the application of the respondent on the ground that there was an error in Form 16A which created the charge. The High Court in its judgment held that the charge was rendered defeasible under s 340(2)(b) of the NLC on the premise that 'it fundamentally conflicted with the Loan Agreement that was the basis of the charge over the subject land and the express intention of the contracting parties, could be regarded as an insufficient and defective instrument'. The Court of Appeal agreed with the learned JC holding that Form 16A as it stood is an insufficient instrument to create a first party charge as the respondent did not at any time receive the loan sum from the appellant. Both the High Court and Court of Appeal held that the instrument for registration was 'insufficient' because it runs counter to the express term of the loan agreement. Learned counsel for the appellant, however, submitted that the sufficiency of the instrument must be considered purely on the instrument itself ie we have to consider and examine Form 16A as filed to see whether on the face of it, it suffers from any insufficiency as to render it defeasible under s 340(2)(b) of the NLC. The relevant provisions of s 340 of the NLC reads:

A

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

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(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

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(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

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What s 340(2) provides is that the title or interest of any person referred to in sub-s (1) is rendered defeasible when the registration was obtained by forgery, or by means of an 'insufficient' or 'void' instrument. In the present case forgery is not an issue. We are, therefore, left with 'insufficient' or 'void' instrument. Haidar J (as he then was) had in the case of *Tan Tock Kwee & Anor v Tey Siew Cha & Anor* [1995] MLJU 408; [1995] 4 CLJ 658, rightly ruled that the

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words 'insufficient' or 'void' appearing in s 340(2)(b) of the NLC ought to be read disjunctively. We agree with Haidar J that because of the conjunctive 'or' appearing between the words 'insufficient' and 'void' in s 340(2)(b) of the NLC, therefore, the two words must be read disjunctively and not

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conjunctively. So any title or interest is not indefeasible if it was obtained by means of either an 'insufficient' or 'void' instrument.

[22] The respondent did not contend that the instrument in the present case is void, their contention is that the charge is liable to be set aside under

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s 340(3)(a) of the NLC on the ground that the Form 16A filed herein is an 'insufficient instrument' falling within s 340(2)(b) of the NLC. For convenience we set out below Form 16A that was filed in this case:

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Borang 16A

GADAIAN

(Untuk Menjamin pembayaran wang pokok)

(Sebelum hendaklah ditaksirkan – atau pembayaran cukai diperaku – dalam ruang ini)	
UNTUK KEGUNAAN PEJABAT PENDAFTARAN	
Ingatan pendaftaran dibuat dalam Dokumen/Dokumen-dokumen Hakmilik Daftar yang dijadualkan dibawah ini mulai dari pukul 10:35 pada 2 haribulan AUG, 1999. Pendaftar/Pentadbir Tanah (tandatangan dan sil) Negeri/Daerah ... JOHOR	Fail mengenai – Gadaian Jild .. 4482 Folio .. 10 Perserahan No. 35022/99

Kami, KCSB KONSORTIUM SDN BHD (No. Syarikat 399940B-A) sebuah syarikat yang di tubuhkan di Malaysia di bawah Akta Syarikat 1965 yang mempunyai alamat berdaftar di No. 2752, Jalan Changkat Permata, Taman Permata, 533 Ulu Kelang, Selangor Darul Ehsan, tuanpunya tanah yang diperihalkan dalam Jadual dibawah ini;

Bagi maksud menjamin:

(a) pembayaran balik pinjaman sebanyak RM465,000,000.00 yang dengan ini saya mengaku telah terima, kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah/tanpa faedah;

(b) ~~pembayaran jumlah wang sebanyak RM..... kepada pemegang gadaian yang tersebut~~ namanya di bawah ini, beserta faedah/tanpa faedah, dan sebagai balasan –

.....

.....

(c) pembayaran kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah/tanpa faedah, akan wang yang dari semasa ke semasa kena dibayar kepadanya ~~berpada akaun semasa saya/akaun yang berikut yang disimpan di antara kami: –~~

Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu beserta faedah atasnya mengikut peruntukan-peruntukan yang dilampirkan di sini.

Bertarikh pada 30 haribulan Julai, 1999.

Penyempurnaan suratcara ini oleh KCSB KONSORTIUM SDN BHD (No. Syarikat 399940B-A) dalam satu cara yang dibenarkan oleh Perlembagaannya di bawah Cop Mohor Rasminya dan Cop Mohor itu diturunkan disini pada 30 hb Julai, 1999

(Cop Mohor)

(t/t) Pengarah

(t/t) Pengarah/Setiausaha

It is not in dispute that the effect of the above Form 16A filed in the present case is to create a first party charge and not a third party charge as intended by the parties. Hence the Form 16A filed runs counter to the loan agreement and the charge annexure.

[23] The critical issue is, does this conflict between Form 16A filed and the loan agreement and the charge annexure render the form to be an 'insufficient instrument' within the meaning of the words in s 340(2)(b) of the NLC. The word 'insufficient' is not anywhere defined in the NLC, therefore, in our view, it must be accorded an ordinary meaning. The dictionary meaning of the word 'insufficient', is 'not sufficient' or 'inadequate' (see *Concise Oxford Dictionary* (9th Ed)). Given the meaning of the word 'insufficient' can we then conclude

A that the Form 16A filed herein, is insufficient or inadequate? In this regard we agree with submission of learned counsel for the appellant that in considering whether the form filed suffers from any insufficiency or otherwise we are to look at the form alone and not elsewhere — meaning to say not to look at the loan agreement or the charge annexure. This view finds support in the High B Court case of *Mook Meng Sun v Lo Aa Kau & Ors* [2002] 2 MLJ 193. In that case the plaintiff sought a declaration that the transfer of certain land by the first and second defendants to the third defendant was void under s 336 of the NLC. The plaintiff's application was grounded on the fact that he had prior to the registration of transfer obtained a prohibitory order which was still C operative on the day of the transfer hence the registrar should have rejected the instrument of transfer. In that case the plaintiff's counsel relied on s 340(2)(b) of the NLC contending that the third defendant's title is defeasible as the registration 'was obtained ... by means of an insufficient or void instrument'. In D dismissing the application, Abdul Aziz Mohamad J (as he then was), stated:

> In my opinion, for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void. There is no evidence as to that as regards the instrument of transfer in this case. As I said, had the instrument been presented and registered a E day later, the plaintiff would have no ground to find fault with the registration. The fact that the registration of the instrument was prohibited by reason of the existence of the prohibitory order cannot, in my opinion, affect the character of the instrument so as to render it an insufficient or void instrument. The prohibitory order is extraneous to the instrument and has nothing to do with the character of the F instrument.

[24] We agree with the observation of the learned judge in the above case, that in considering whether the instrument was sufficient or not we have to consider the instrument alone without resorting to other documents which is G '... extraneous to the instrument and has nothing to do with the instrument'. In the present case paras (b) and (c) of the charge instrument were deleted hence making it into a first party instead of a third party charge as intended by the parties. Apart from that error the instrument does not suffer from any other deficiency. Form 16A was sealed with the seal of the respondent's company and H attested to by directors of the company or a director together with the secretary of the company. For those reasons we find that Form 16A filed in the present case is not an 'insufficient instrument' as envisaged by s 340(2)(b) of the NLC which renders the charge created pursuant thereto defeasible.

I **[25]** *The second issue is whether the error can be corrected pursuant to s 380(1) of the NLC.*

[26] For convenience we set as below the relevant provisions of the said section:

Section 380 Correction of errors in documents of title, etc

(1) Where the Registrar is satisfied —

(a) that any document of title has been registered or issued in the wrong name, or contains any mis-description of land or boundaries, or other error or omission, or

(b) that any memorial or other entry has been made in error on any document of title or other instrument relating to land, or

(c) that any memorial or other entry made on any such document of title or instrument itself contains any error or omission,

he may, subject to sub-sections (2) and (3), make such correction on the document or interest in question as may be appropriate in the circumstances of the case.

This section confers upon the registrar a wide discretion to make any correction on the document of title or instrument relating to land as may be appropriate. It is wide enough to include any entry howsoever wrongly made by the registry (see *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53). In *Hassan bin Seman & Ors v Jusoh bin Awang Chik* [1982] 1 MLJ 66, rectification of the register was ordered where the transferee was wrongly registered as having full shares in the land. The correction there was made pursuant to s 380(1)(c) of the NLC. In that case Salleh Abas FJ (as he then was) emphasised that the provision relating to indefeasibility and correction must be read separately where His Lordship observed:

> The provision for correction of error is not even treated by the Code as an exception to indefeasibility provision. Thus correction of an error can never be a violation of the indefeasibility principle, and must remain outside the scope of the indefeasibility principle.

Relying on *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, the court then directed the registrar pursuant to s 417 of the NLC to correct the error.

[27] Reverting to the present case it is not in dispute that the deletion of the wrong paragraphs in Form 16A was a mere error and the error does not have the effect of transforming the charge into a transfer or to any other instrument of dealing.

[28] The next question then, is whether the error is remediable under the NLC. The test to be applied in this regard was set down by this court in *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681. The two tests to be applied are — (a) whether there has been substantial compliance of the prescribed form; and (b) whether any party has been prejudiced or misled by the error.

[29] Applying the two tests to the present case, there is no doubt that there exist substantial compliance with the prescribed form notwithstanding the error. Secondly, it has never been suggested that anyone, be it the respondent or any other party, is ever prejudiced by the error. The respondent never denied that the loan sum of RM59m had been disbursed to the borrower on the security of the charge, albeit it was registered as a first party charge. We do not see what difference would it make to the respondent whether it was first party or third party charge, the relevant property is still subject to a charge. Therefore, we do not see how the respondent could be said to have been prejudiced or misled by the error. On the above premise, we hold that the error in Form 16A filed in this case may be rectified by the registrar pursuant to s 380(1)(b) of the NLC to achieve what was intended by the parties.

Section 417 of the NLC

[30] The appellant is relying on s 417 of the NLC for the court to give the necessary direction to registrar to give effect to the decision of the court. Section 417 of the NLC reads:

> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.
>
> (2) Where, pursuant to any order made by virtue of this section, the Registrar or any Land Administrator —
>
> (a) cancels any instrument relating to land, or any memorial or other entry on any such instrument, or
>
> (b) makes any other amendment of, or addition, to, any such instrument, he shall note thereon the reason for the cancellation, amendment or addition, and the date thereof, and shall authenticate the same by his signature and seal.
>
> (3) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

As regards the application of s 417 the Court of Appeal held that before a party, in this case the appellant, could invoke the said section it should first have obtained a judgment or order relating to land under the NLC. The Court of Appeal cited *Woon Kim Poh v Sa' Amah bt Hj Kasim* [1987] 1 MLJ 400 in support of the proposition. Upon close scrutiny of the case we could not find any statement to that effect. What the court said was that, '... Section 417(1) of the National Land Code does not authorise the making of an order or direction

contrary to the National Land Code itself'.

[31] The case of *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547 was also cited in support of the same proposition. The respondent relied on what was said by Wan Adnan FCJ (as he then was) at p 554 which reads:

> In our view, the words '... be necessary to give effect to any judgment or order given or made in any proceedings' in s 417(1) are very important. These words limit the power of the court to give directions to the registrar. The court can only give directions to the registrar if such directions are necessary to give effect to any judgment or order of the court. *There must first be a final judgment or order of the court. Then only, in order to give effect to such judgment or order, the court can give directions to the registrar*. (Emphasis added.)

The words underlined were construed to mean that there must first exist a final judgment or order of the court then only the court can give direction under s 417 to give effect to the judgment or order. However, at p 555, the learned judge elaborated further in the following words:

> Thus, where for example the court in a proceeding relating to a particular piece of land makes an order that an instrument of transfer in respect of such land is void, the court may direct the registrar to remove any memorial made pursuant to such void instrument of transfer from the register and issue document of title in respect of the said land. Such direction is necessary to give effect to the order that the court has made.

In our view what the learned judge said was that any court making an order on any matter which relates to land may, consequent upon the order, give such direction to the registrar as may be necessary to give effect to such order. There is nothing in the judgment to say that a party has to firstly obtain the order of court in one proceeding and subsequently apply in another proceeding for a direction under s 417 of the NLC. Therefore, we do not find anything in the judgment which goes to support the two-stage approach/process, as submitted by learned counsel for the respondent.

[32] On the contrary we find that there are ample authorities to support the single-stage approach as advocated by learned counsel for the appellant (see *Hassan bin Seman*; *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b and *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181).

[33] In *Takako Sakao* this court unequivocally stated:

> To prevent any further fraud and for the purpose of preserving the subject property in specie, on 27 October 2009 we directed the Registrar of Titles to enter his caveat pursuant to s 320 read with s 321 of the National Land Code. We did so in the

exercise of the powers conferred by s 417 of the National Land Code. *It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment*. (Emphasis added.)

In our view, it is clear that under s 417 of the NLC, the court is vested with the power to direct the registrar to do anything it deems necessary to give effect to its judgment or order. This broad power is conferred by the NLC on the court to ensure that judgment or order of the court is duly carried out by the registrar.

CONCLUSION

[34] For the reasons alluded to above, we hold that the impugned charge is a valid charge and accordingly the order of the High Court as affirmed by the Court of Appeal is set aside. Further, in exercise of the power under s 417 of the NLC, we direct the registrar to review the file relating to the said charge and cause the rectification of the charge as a third party charge.

[35] In the result we allow the appeal with costs.

Appeal allowed with costs; order of High Court as affirmed by Court of Appeal set aside.

Reported by Dzulqarnain Ab Fatar